Supreme Court, U.S.
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In the

Supreme Court of the United States

PETER A. SARDAGNA, an individual; LAMM EMPLOYEES LP; LAMME INCORPORATED,

Petitioners,

v.

THE SOUTHERN CALIFORNIA, ARIZONA, COLORADO, AND SOUTHERN NEVADA GLAZIERS ARCHITECTURAL METAL AND GLASS WORKERS PENSION TRUST, an employee pension benefit plan; CB RICHARD ELLIS INVESTORS, L.L.C., a Limited Liability Company as Investment Manager of the Southern CA AZ CO & Southern Nevada Glaziers Architectural Metal & Glass Workers Pension Trust; LA METROMALL LLC, a California Limited Liability Company.

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) May the Trustees of an ERISA Pension Plan, having actual knowledge of a breach or violation of ERISA, extend the period of limitations set forth in ERISA §413 [29 USC § 1113], which provides that an action based on any alleged violation of ERISA must be commenced no more than three years from "the earliest date on which the plaintiff had actual knowledge of the breach or violation," by hiring a new investment manager with no previous knowledge of the alleged violation, joining the new investment manager as a co-plaintiff, and having the period of limitations commence to run anew from the date of such hiring?

2) Can the Trustees of an ERISA Pension Plan who structure and conduct a transaction, and who manage and control the subsequent litigation alleging that the transaction violated ERISA, avoid the bar of limitations set forth in ERISA §413 [29 USC § 1113] – after judgment is entered, and even though they did not benefit personally from the transaction – merely by characterizing themselves as wrongdoing Trustees?

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I

PETITION FOR WRIT OF CERTIORARI

Petitioners Peter A. Sardagna, LAMM EMPLOYEES, LP, and LAMME, Inc. respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

This action was brought by the Respondent Glaziers Pension Plan, an ERISA Benefit Plan, against Petitioner Sardagna and others. The complaint sought damages for alleged fraud, RICO violations and breach of contract; and also sought an equitable decree of rescission under ERISA with respect to a transaction concluded on August 16, 1995.

The first three claims were tried to a jury, which found for Sardagna. The ERISA claim was tried to the District Court, which concluded that since the complaint was filed on August 6, 1999, and the plaintiff Plan had actual knowledge of the breach or violation when it occurred on August 16, 1995, the ERISA claim was barred by the three-year statute of limitations set forth in 29 USC §1113 [ERISA §413] [Memorandum Opinion and Final Judgment, Appendix 8a; Judgment on Jury Verdict, Appendix 23a; Judgment on Decision by Court, Appendix 25a]

The Glaziers then moved to alter or amend the judgment. Among other things, they argued for the first time that the Trustees of the plaintiff Plan were wrongdoing fiduciaries, that therefore their "actual knowledge" should not be imputed to the Plan, and that the statute of limitations began to run anew when the Glaziers hired C B Richard Ellis as a new investment manager in 1998, who had no "actual knowledge" of the

breach or violation until it was hired. Since CB Richard Ellis had been named as a nominal co-plaintiff, the Glaziers argued that the statute ran only from 1998. The District Court ultimately agreed with this analysis. [Order on Motion to Amend Judgment, etc., Appendix 27a, 31a]

On appeal, the United States Court of Appeals for the Ninth Circuit, in a Memorandum Opinion [Appendix, 1a] affirmed this conclusion without any extended discussion or analysis.

All opinions below are unreported.

JURISDICTION

The Judgment of the Circuit Court of Appeals was entered on May 16, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The statute involved is 29 U.S.C. §1113 [ERISA §413] which provides as follows:

29 USC § 1113. Limitation of actions [ERISA §413]

No action may be commenced under this title with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part [29 USCS §§ 1101 et seq.], or with respect to a violation of this part [29 USCS §§ 1101 et seq.], after the earlier of—

(1) six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission, the latest date on which the fiduciary could have cured the breach or violation, or

(2) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation; except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation.

STATEMENT

On August 16, 1995, Sardagna, through his wholly-owned and controlled entities LAMM Employees LP and LAMME INC., became a member of LA MetroMall, LLC, a California Limited Liability Company, together with the Southern California, Arizona, Colorado and Southern Nevada Glaziers Architectural Metal and Glass Workers Pension Trust (the Glaziers). LA MetroMall, LLC, was organized to acquire and develop a157-acre parcel of vacant land in Carson, California (the Carson property). The entire LA MetroMall transaction was devised, structured, organized and documented by the Glaziers and their counsel. Sardagna had no counsel of his own in that transaction.

In 1997, disputes arose between Sardagna and the Glaziers concerning their respective rights and interests in LA MetroMall, LLC, and the Carson property. Sardagna filed an action against the Glaziers in the Los Angeles Superior Court. However, on the motion of the Glaziers to compel arbitration of the dispute, and based on an arbitration clause in the LA MetroMall, LLC, Operating Agreement, the Superior Court action was suspended and the matter was sent to arbitration before the American Arbitration Association.

On August 6, 1999, nearly four years after the transaction in which LA MetroMall, LLC, was organized, and after the arbitration had progressed for many

months, and just before it was to be heard, the Glaziers filed this action in the District Court for the Central District of California. The District Court had jurisdiction under 28 USC §1331, and exclusive jurisdiction over the ERISA claims under 29 USC §§1109 and 1132(e)(1). In essence, the Glaziers alleged that Sardagna, William L. Seay, its long time administrator, and Robert Ferrante, had engaged in an elaborate, complicated and unlawful conspiracy throughout the period from 1989 to 1997, designed to defraud and impose upon the Glaziers by causing them to invest in the Carson property, which was allegedly highly risky and grossly speculative, solely for the financial gain of Sardagna, Seay, and Ferrante and to the severe economic detriment of the Glaziers. Based on this alleged eight-years-long, 1989 -1997, three-man conspiracy, the Glaziers sought large monetary damages for alleged fraud and RICO violations; additional damages against Sardagna for alleged breach of contract under the LA MetroMall, LLC, Operating Agreement; and finally, under ERISA, "an equitable order or decree canceling the LA MetroMall, LLC, Operating Agreement" and various other types of equitable relief.

When the federal action was filed, the Glaziers sought and obtained an order staying the arbitration between Sardagna and the Glaziers which they had earlier demanded, and which was then about to proceed to a hearing on the merits, and requiring the dispute to be litigated in the Glaziers' new federal action. The ground of their request was that the dispute between the Glazers and Sardagna was inextricably intertwined with its claims against Seay and Ferrante (neither of whom had any arbitration agreement with the Glaziers), and that the entire dispute should therefore be litigated in the federal action. Sardagna appealed from that ruling, but it was affirmed by the Ninth Circuit in an

unpublished Opinion on April 11, 2001. [Southern California Glaziers v. Sardagna, Ninth Circuit Case No. 99-56731]

Meanwhile, in February 2001 (just before the original order staying arbitration was affirmed), the Glaziers settled with Seay and Ferrante, and dismissed the complaint as to them, leaving Sardagna as the only remaining defendant in the federal suit. Sardagna moved to remand the dispute to arbitration, but that motion was denied by the District Court.

The Glaziers' case against Sardagna proceeded to trial in the District Court in May 2001. The Glaziers' claims against Sardagna for damages for fraud and alleged RICO violations (still based on his alleged conspiracy with Seay and Ferrante, despite the Glaziers' settlement and dismissal of those defendants), and for breach of contract, were all tried at length to a jury, and were all resolved by the general verdict of the jury in Sardagna's favor. [Judgment on Jury Verdict, Appendix 23a] Sardagna repeatedly and urgently asked the District Court to have the jury make special findings of fact in addition to its general verdict, particularly on those issues which were pertinent to the Glaziers' ERISA claims, since those claims would have to be tried to the court. However, the Glaziers objected, and the District Court declined to have the jury make special findings or answer any special interrogatories.

Following the jury's verdict on the first three counts, a court trial was scheduled on the Glaziers' ERISA claims. At this point, the Glaziers narrowed and limited their ERISA claim to a request for rescission and cancellation of the August 16, 1995, LA MetroMall, LLC, Operating Agreement. The effect of this request, if it were to be granted, would be to eliminate Sardagna's interest in LA

MetroMall, LLC, and the Carson property, and leave the Glaziers with sole ownership and control of the Carson property. The parties agreed, at the ERISA phase of the trial, that the District Court could and should consider the evidence introduced before the jury during the first phase. Lengthy post-trial briefs on the ERISA issues were submitted on both sides. Ultimately, the District Court issued a Memorandum Opinion and Final Judgment in Sardagna's favor, holding that the Glazier's ERISA claim for rescission and cancellation of the LA MetroMall, LLC, Operating Agreement was barred by the three-year provision of 29 USC § 1113, since the Glaziers manifestly had actual knowledge of the August 16, 1995, transaction when it occurred, and the action was not brought until almost four years later. The District Court expressly rejected the argument that the three-year period began anew when CB Richard Ellis was hired as the Glaziers' investment manager. Thus, all of the Glaziers' claims against Sardagna were finally resolved in Sardagna's favor. [Memorandum Opinion and Final Judgment, Appendix 8a; Judgment on Decision by Court, Appendix 25a]

In connection with the limitations issue, the Glaziers argued that Sardagna had waived the defense of limitations by failing to plead it adequately as an affirmative defense in his Answer. However, the District Court concluded that the defense of limitations could not have been waived because it was unavailable to Sardagna so long as the Glaziers continued to press their eight-years-long, 1989-1997, three man conspiracy theory, since if those allegations were established the action (filed in 1999) would have been timely brought even under the three-year provision of 28 USC §1113. Furthermore, Sardagna had actually raised the defense of limitations before the commencement of the jury trial, and in any event the Glaziers were not prejudiced.

The Glaziers also argued that its new administrator, CB Richard Ellis Inc., was a co-plaintiff; that it had been hired as the Glaziers' new administrator in 1998, and thus could have learned of the alleged ERISA violations no earlier than 1998; and therefore the action, filed in 1999, was timely. Citing the Ninth Circuit's Opinion in *Landwehr v. Dupree* 72 F.3d 726 (9th Cir. 1995), the Glaziers argued that the knowledge of the Glaziers' Trustees, Administrator, lawyers and other representatives in 1995 should not be imputed to CB Richard Ellis. In its Memorandum Opinion and Final Judgment [Appendix 8a], the District Court considered and explicitly rejected all these arguments:

> "Similarly, under CB Ellis' position, parties could always transfer their claims to be brought by another party who would get a fresh three years under the actual knowledge clause of the statute of limitations. The effect of this theory would be to replace the actual knowledge provision with only the six year commission of the violation statute of limitations. Thus CB Ellis' theory would similarly frustrate Congress' provision of both a six-year statute of limitations based on the actual commission of the breach and the inclusion of a three-year statute of limitations that rests upon a party's actual knowledge. . . .
>
> Accordingly, the Court holds that that Glaziers Plan's undisputed actual knowledge of the alleged misconduct that occurred on August 16, 1995, is imputed to CB Ellis because the parties are for all relevant purposes identical and allowing

> otherwise would frustrate Congress' purpose of including a statute of limitations tied to the injured party's actual knowledge." [Memorandum Opinion and Final Judgment, Appendix 18a-19a]

The Glaziers then moved to alter or amend the judgment. The Glaziers' moving papers essentially sought reconsideration, repeating the arguments previously advanced and rejected. However, at the initial hearing on this motion, counsel for the Glaziers made the breathtaking argument that the Trustees of the Glaziers Pension Trust, who had been Trustees at the time of the August 16, 1995 transaction, and who were still Trustees, and who were still his clients; and three of whom (Jayroe, Mitchell and Wheatley) had attended throughout the trial and testified in support of the Glaziers' claims, were actually wrongdoers who, he said, had participated in the alleged wrongful conduct of Sardagna (and Seay and Ferrante). Counsel said the Trustees had not been sued, named or even identified or accused as wrongdoers in the complaint or at the trial, because they had no personal financial resources and probably could not respond to any judgment, and because the rescission of the LA MetroMall, LLC, Operating Agreement was not in their power to provide. Based (apparently) solely on counsel's belated tactical decision to point the finger at his own clients, and without any evidence to support its new conclusion, the District Court did a 180-degree about-face and reversed its ruling in the limitations issue.

> "Here, the only people Sardagna claims had knowledge of the breach or violation prior to the arrival of CB Ellis are wrong-doing fiduciaries. And although this case

> is unusual in that the wrongdoing fiduciaries are not named defendants does not compel the conclusion that their knowledge should be imputed to others." [Order on Motion to Amend Judgment, etc., Appendix 27a, 31a].

Turing to the substantive ERISA issues, the District Court ruled that the Glaziers' claims were not barred by judicial estoppel; Sardagna was not a fiduciary of the Glaziers' Plan; that he did not knowingly participate in any breach of fiduciary duty by others who were fiduciaries of the Plan; and that the Glaziers' claims under ERISA §404 should be rejected. However, the District Court deferred ruling on whether Sardagna was a "service provider," so that the August 16, 1995, transaction might be a "prohibited transaction" under ERISA §406, and requested further briefing on this issue.

Ultimately, the District Court ruled in favor of the Glaziers on this last point [Further Order re Motion to Amend Judgment, etc., Appendix 45a] It held that Sardagna was indeed a "service provider" to the Plan, so that the August 16, 1995, transaction was indeed a "prohibited transaction" under ERISA §406. Acordingly, the District Court held that the August 16, 1995, LA MetroMall, LLC, Operating Agreement should be rescinded and cancelled.

Sardagna appealed timely from this Order. The Glaziers cross-appealed from the original judgment in Sardagna's favor. In a Memorandum Opinion [Appendix 1a], the Ninth Circuit affirmed the Order and Judgment of the District Court.. On the issue of the three-year statute of limitations, it simply declared, without discussion or analysis, that "The three-year statute of limitation

started to run on September 1, 1998, when the Plan hired CB Richard Ellis, the fiduciary plaintiff in this case, as investment manager of the Plan," citing only *Landwehr v. DuPree*, *supra* [Memorandum Opinion, 4; Appendix 4a]

REASONS WHY THE PETITION SHOULD BE GRANTED

I

THE TRUSTEES CANNOT EXTEND THE PERIOD OF LIMITATIONS SIMPLY BY HIRING A NEW INVESTMENT MANAGER AND NAMING IT AS A CO-PLAINTIFF

There cannot be any question that this action was filed on August 6, 1999, nearly four years after the transaction in which LA MetroMall, LLC, was organized. ERISA §413 [29 USC §1113] states unequivocally that no action may be commenced based on any violation of ERISA no more than three years after "the earliest date on which the plaintiff had actual knowledge of the breach or violation."

In this case, the "plaintiff" is the Glaziers' Pension Trust (described in the Complaint as "the Plan.") The "breach or violation" on which the ERISA judgment is predicated is that the August 16, 1995, LA MetroMall, LLC, transaction between the Glaziers and Sardagna was a prohibited transaction under ERISA §406 [29 U.S.C. §1106] because Sardagna was allegedly a "service provider" to the Glaziers. Whether or not derivative liability may be imposed on Sardagna under the law, at the very least the Trustees and the plaintiff Plan necessarily had "actual knowledge" of Sardagna's status and of the transaction when it occurred in 1995.

The Glaziers argued, with great enthusiasm, that in any event the statute of limitations had not run against the plaintiff Glaziers Pension Trust or Plan, because their newly hired Administrator and investment advisor, CB Richard Ellis, whom they had named as a tag-along plaintiff in this case, was not engaged or associated with the Glaziers until 1998, and therefore did not learn of the August 16, 1995, LA MetroMall, LLC, transaction until about a year before the suit was filed. The Glaziers cited and quoted from *Landwehr v. DuPree*, *supra*, 72 F.3d 726 (9th Cir. 1995) in (supposed) support of this argument.

In *Landwehr*, a suit was brought by two employee beneficiaries of the Astoria Seafood Company Profit Sharing Plan (Landwehr and Cole) against one DuPree, a chauffeur employed by Kindred, the owner of the Company and a Trustee of the Plan. Landwehr and Cole alleged that, unbeknownst to them until much later, Kindred had improperly transferred plan assets to his chauffeur, DuPree, in violation of the "prohibited transaction" provisions of ERISA §406. Their complaint was that Kindred (with the knowledge and consent of his then wife, Tarabochia) had given DuPree funds of the Plan that properly belonged to them. It appears that the only beneficiaries of the Plan were Landwehr, Cole, Kindred and Tarabochia. Thus, although the action was brought on behalf of the Plan, the only real parties plaintiff in interest, and the only persons who would benefit from the lawsuit, were Landwehr and Cole.

DuPree argued that the action was barred because, even though Landwehr and Cole learned of the transfers less than three years before they brought the suit, Kindred – a Plan fiduciary – knew of the transfers more than three years before the suit was filed, and therefore (DuPree argued) the suit brought on behalf of the Plan was

barred. Understandably, the Court rejected this argument, holding that the knowledge of Kindred, the wrongdoing fiduciary, could not be attributed to Landwehr and Cole, his beneficiaries and the only real victims, so as to bar their claims, when they were the real parties plaintiff and had no knowledge of the wrong until less than three years before they filed suit.

The District Court, and the Ninth Circuit, found for the Glaziers on the authority of *Landwehr*.[1] But *Landwehr* simply has nothing to do with this case. The breach or violation in this case does not consist of the surreptitious giveaway of the Glaziers' funds by a fiduciary to a non-participant, as in *Landwehr*; but rather the knowing and intentional structuring, drafting and subsequent entry of the Pension Trust itself into a formal agreement with full knowledge and consent of

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[1] The Glaziers cited three published and one unpublished District Court decisions to the Ninth Circuit in support of their argument that the knowledge of the Trustees should not be imputed to CB Richard Ellis for purposes of limitations. Useden v. Acker, 734 F. Supp. 978, 980; Crimi v. PAS Industries (1995) U.S. Dist. LEXIS 6180 (S.D.N.Y. 1995); Mason Tenders Dist. Council Pension Fund v. Messera, 958 F. Supp. 869, 882 (S.D.N.Y. 1997) and District 65 Retirement Trust v. Prudential Securities, Inc., 925 F. Supp. 1551, 1559 (N.D. Ga. 1996).

First, all four of these cases involved pre-trial motions to dismiss or for summary judgment, where the decision turned on the allegations of the complaint or on affidavits raising disputed but triable questions of fact. Second, none of them involved a situation like the one presented in this case, where the wrongdoing fiduciaries who had entered into the original improper transaction were still in charge of the Plan, but had merely hired the named plaintiff as a stand-in in order to extend the period of limitations.

The Ninth Circuit cited only *Landwehr* on this point, and did not refer to these cases.

the Trustees themselves, as well as their representatives and independent attorneys. The principal plaintiff here, and the real party plaintiff in interest, is the Glaziers' Plan itself. The Trustees are mostly the same individuals who were Trustees when they caused the Plan to enter into the August, 1995, LA Metro-Mall, LLC, transaction which they have now sued to avoid. If, as *Landwehr* holds, the knowledge that counts for purposes of the statute of limitations is the knowledge of the real party plaintiff, this action is barred, because the real party plaintiff knew all of the facts constituting the supposed ERISA violation in 1995, more than three years prior to the time this suit was filed in 1999.

The idea that the statute of limitations began to run anew when the Glaziers hired CB Richard Ellis in 1998, because CB Richard Ellis was unaware of the 1995 transaction until after it was hired, is simply silly. It certainly finds no support whatever in *Landwehr* or any other case. Among other things, CB Richard Ellis is not by any stretch of the imagination the real party plaintiff here; it has no interest of its own in this lawsuit, or any interest at all except by virtue of its current status as the Plan's representative. Indeed, if plaintiffs' argument were actually the law, any Plan could extend its period of limitations indefinitely, simply by firing one administrator and hiring a new one, and then another, *ad infinitum*. The law is not such an ass.

II

THE TRUSTEES CANNOT AVOID THE BAR OF LIMITATIONS MERELY BY CHARACTERIZING THEMSELVES AS WRONGDOERS

After reading the District Court's emphatic rejection of their *Landwehr* argument in its original Memorandum

Opinion and Final Judgment, [Appendix 8a], the Glaziers (or more likely, their counsel) concluded to attempt to shoehorn their ERISA claim into the *Landwehr* analysis by asserting that the Trustees of the Glaziers' Plan were themselves wrongdoers (like Kindred in the *Landwehr* case), so that their manifest and indisputable knowledge of the facts of the August 16, 1995, LA MetroMall, LLC, transaction could not be imputed to the Plan (or, presumably, to CB Richard Ellis, the new Administrator).

There can be no question that this assertion was made as a last-ditch, last-minute, desperate litigation maneuver, designed to circumvent the District Court's reasoning and conclusion in its original Memorandum Opinion and Final Judgment. It should have been rejected as an affront to the Court, for at least the following reasons:

a) The assertion was not supported by any testimony, documents, or even by declarations or affidavits. It was founded solely on the unsworn accusation by counsel of record for the Southern California, Arizona, Colorado, and Southern Nevada Glaziers Architectural Metal and Glass Workers Pension Trust, the first-named plaintiff in the action. There was never any evidence, or indeed even a suggestion from counsel, that the Trustees were "wrongdoers" in the sense that they benefited, or hoped to benefit, personally from the transaction, or that they entered into it for any reason other than that they thought it was good for the Trust. The only claimed "wrongdoing" by the Trustees was that they allowed the transaction to happen. The Pension Trust, the named plaintiff, is described in the Complaint and the Plaintiffs' Pre-Trial Conference Order as the "Plan." The supposedly wrongdoing Trustees of the Plan were effectively his own clients. Three of them (Jayroe,

Mitchell and Wheatley) were Trustees at the time of the August 16, 1995, LA MetroMall, LLC, transaction; they were still Trustees, and still his clients, at the time of trial and at the time (November 15, 2001) counsel made this assertion. Indeed, Jayroe, Mitchell and Wheatley personally attended throughout the trial, and testified for the Glaziers during the jury phase of the case.

The District Court and the Ninth Circuit should never have countenanced this tactic, and neither should this Court. While the behavior of counsel for the Glaziers in this case toward the Trustees is certainly extraordinary, it is not wholly without precedent. In *Pennix v. Winton* (1943) 61 Cal.App. 2d 761, 143 P.2d 940, the California Court of Appeal was confronted with a functionally identical scenario. Plaintiff Pennix was a guest and passenger in a car driven by the defendant Winton when they were on a date, and was injured in an accident. Pennix sued Winton, claiming (as then required by the guest statute) that Winton was intoxicated and guilty of willful misconduct. At the trial, Winton testified essentially in support of Pennix' claim, admitting that he was intoxicated and guilty of willful misconduct. Winton's lawyer, who had been selected and provided by his automobile liability insurance carrier, adopted the strategy of accusing his own client of colluding with Pennix, and of intentionally lying about his alleged intoxication and willful misconduct in order to help Pennix. The jury apparently accepted this theory, and found for Winton. On appeal, the plaintiff argued that the pursuit of this trial strategy by Winton's lawyer – that is, attacking the honesty and veracity of his own client – was prejudicial misconduct of which she had standing to complain. The Court of Appeal discussed the matter at length and ultimately agreed, with the following observations pertinent here [61 Cal. App 2d at 766 -776]:

"We now turn to a contention of plaintiff which raises a question of first impression and which requires rather extended discussion. The contention is that counsel for defendant was guilty of prejudicial misconduct which prevented plaintiff from having a fair trial on the real issues involved. While several instances of alleged misconduct are cited, the main burden of plaintiff's argument is that counsel for defendant, while purporting to represent defendant, introduced into the case the issue of alleged collusion between plaintiff and defendant; that counsel in reality abandoned the defendant as his client . . . ; that he attempted to impeach his own client; and that he attacked generally the character and motives of defendant as well as plaintiff. . . .

The true position of counsel for defendant was made entirely clear in his argument to the jury. While it is true that he argued that plaintiff had been drinking, the main theme of his argument was an attack upon the character and veracity of both plaintiff and defendant and he urged upon the jury the claim that plaintiff and defendant were in collusion. . . .

The first question for determination is whether an attorney, purporting to act as counsel for defendant in a guest case, may continue to act as such counsel while bitterly attacking defendant and while openly charging plaintiff and defendant

with collusion involving criminal acts on the part of both without being himself chargeable with misconduct. In our opinion, he may not. . ..

Having purported to enter the trial of the cause as the trusted and confidential adviser of defendant, counsel for defendant turned upon his client and, without according to the client the benefit of any warning or the benefit of any true representation by counsel, suddenly changed his real role from that of the defender of defendant upon the charges made by the pleadings to that of the prosecutor of defendant upon charges not embraced within the pleadings and thereafter inflicted upon defendant the proverbial stabs in the back . . ..

Our conclusions regarding the duties of counsel toward his client are not affected by the fact that the misconduct of counsel toward his client may have resulted in a verdict in favor of his client. We are dealing for the moment solely with the question of whether there was misconduct rather than the question of whether such misconduct was prejudicial to either plaintiff or defendant. In passing, however, we may observe that there are many things in life which are more precious than the pocket book and that many bona fide litigants would prefer to have a judgment entered against them rather than to have a judgment entered in their favor at the expense of being defamed in open court

> by one purporting to act as their trusted and confidential adviser."

If these considerations required the result in *Pennix*, an action at law for personal injuries, they require the result *a fortiori* in this case, a proceeding under ERISA governed entirely by equitable principles.

b) The argument that the Trustees were the wrongdoers was manifestly an afterthought, cooked up for the first time, for litigation purposes, only after the entry of judgment. There is no hint or suggestion of this idea in the Complaint or the Glaziers' Proposed Pre-Trial Conference Order which was adopted by the District Court. On the contrary, the gist of the claims alleged in those pleading is that the Trustees were the victims, not the perpetrators.[2] The Glaziers' pleadings clearly identify Sardagna, Seay and Ferrante as the (alleged or supposed) co-conspirators and wrongdoers, and the Plan and the Trustees as their victims, and the recipients of their (alleged or supposed) misrepresentations and fraudulent advice. During their presentation of evidence at the trial, the Glaziers likewise insisted that the Trustees were victims, not wrongdoers. The Glaziers were not and are not entitled to obtain a judgment on a theory which they not only failed to disclose in their

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[2] There is one minor exception; the Complaint and the Glaziers' Pre-Trial Conference order do suggest (necessarily, because only the Trustees have a duty of "prudence") that the Trustees breached their fiduciary duty in that the August 16, 1995, LA MetroMall, LLC, was "imprudent," and that Sardagna is said to be liable for knowingly aiding and abetting this alleged breach of fiduciary duty. However, the District Court rejected this theory [Order re Motion to Amend Judgment, etc., Appendix 27a, 42a-43a]; and in any event, it is irrelevant to the limitations issue or to when the plaintiff in this case had knowledge of the alleged "breach or violation" consisting of the "prohibited transaction" under ERISA §406.

pleadings or at trial, but which is actually diametrically inconsistent with the theory they did plead and advance at trial.

c) The Glaziers' principal objective in labeling the Trustees as wrongdoers was to prevent their (indisputable) knowledge of the pertinent facts in 1995 from being imputed to the Glaziers, and to allow the co-plaintiff, CB Richard Ellis, to masquerade as an independent litigation representative of the Glaziers with rights and claims separate from those being asserted by the Trustees on behalf of the Glaziers. But as the District Court originally (and correctly) determined, the claims of CB Richard Ellis were and are wholly derivative. CB Richard Ellis was not involved with the Glaziers in any way in 1995 when the transaction occurred and the claim arose. If the Glaziers could extend the period of limitations merely by firing one Administrator and hiring another, they could extend it indefinitely for the full six-year period, and the three-year period running from actual knowledge would be read out of 29 USC §1113.

The District Court, after all, is a Court of law and equity, not a basketball court where fast and frequent passing of the ball from one player to another is a central feature of the game. Indeed, even on a basketball court, the rules do not allow a score to be made after the clock has run out.

III

CERTIORARI SHOULD BE GRANTED TO PREVENT NULLIFICATION OF THE STATUTE OF LIMITATIONS IN ERISA CASES

As the Fifth Circuit observed in *Radford v. General Dynamics Corporation*, 151 F.3d 396, 400 (5th Cir. 1998), ERISA §413 is a "statute of repose," whose purpose is to "serve as a cut-off."

It may well be that *Landwehr v. Dupree* was decided correctly on its peculiar facts. However, the unwarranted expansive construction placed upon that decision by the District Court and the Ninth Circuit in this case, allowing for the automatic re-commencement of the period of limitations whenever a new fiduciary is hired, effectively grants every ERISA Plan with actual knowledge of an ERISA violation the option to extend the statute at will, merely by hiring a new investment manager just before – or even after – the three-year statute of limitations expires. This Court should grant certiorari so that *Landwehr v. Dupree* is not permitted to balloon into a loophole which will nullify the statute.

IV

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 02-55796, No. 02-56042

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE SOUTHERN CALIFORNIA, ARIZONA, COLORADO, AND SOUTHERN NEVADA GLAZIERS ARCHITECTURAL METAL AND GLASS WORKERS PENSION TRUST, an employee pension benefit plan; CB RICHARD ELLIS INVESTORS, L.L.C., a Limited Liability Company as Investment Manager of the Southern CA AZ CO & Southern Nevada Glaziers Architectural Metal & Glass Workers Pension Trust; LA METROMALL LLC, a California Limited Liability Company,
Plaintiffs - Appellees,

v.

WILLIAM L. SEAY; ROBERT A. FERRANTE, an individual; LARRY ROTHMAN AS TRUSTEE OF 5TH AVENUE INVESTMENT TRUST I & II, a trust organized under CA law; BRISTOL LIMITED I, a California Corporation; BRISTOL PARTNERS LLC, a Delaware LLC; CARSON PARTNERS INC., a California Corporation; CARSON REALTY PARTNERS 1989 LP, a California LP; METRO CORPORATION INC., a California Corporation, Defendants, and, PETER A. SARDAGNA, an individual; LAMM EMPLOYEES LP; LAMME INCORPORATED,
Defendants - Appellants.

THE SOUTHERN CALIFORNIA, ARIZONA, COLORADO, AND SOUTHERN NEVADA GLAZIERS ARCHITECTURAL METAL AND GLASS WORKERS PENSION TRUST; LA METROMALL LLC,
Plaintiffs,

and,

CB RICHARD ELLIS INVESTORS, L.L.C.,
Plaintiff - Appellant,

v.

WILLIAM L. SEAY; ROBERT A. FERRANTE, an individual; LARRY ROTHMAN AS TRUSTEE OF 5TH AVENUE INVESTMENT TRUST I & II, a trust organized under CA law; BRISTOL LIMITED I, a California Corporation; BRISTOL PARTNERS LLC, a Delaware LLC; CARSON PARTNERS INC., a California Corporation; CARSON REALTY PARTNERS 1989 LP, a California LP; METRO CORPORATION INC., a California Corporation, Defendants, and, PETER A. SARDAGNA, an individual; LAMM EMPLOYEES LP; LAMME INCORPORATED,
Defendants - Appellees.

May 5, 2003, Argued and Submitted,
Pasadena, California
May 16, 2003, Filed

COUNSEL: For THE SOUTHERN CALIFORNIA, ARIZONA, COLORADO, AND SOUTHERN NEVADA GLAZIERS ARCHITECTURAL METAL AND GLASS WORKERS PENSION TRUST, CB RICHARD ELLIS INVESTORS, L.L.C., LA METROMALL LLC, Plaintiffs - Appellees (02-55796): Richard R. Mainland, Esq., FULBRIGHT & JAWORSKI, Los Angeles, CA.

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For THE SOUTHERN CALIFORNIA, ARIZONA, COLORADO, AND SOUTHERN NEVADA GLAZIERS ARCHITECTURAL METAL AND GLASS WORKERS PENSION TRUST, LA METROMALL LLC, Plaintiffs (02-56042): Richard R. Mainland, Esq., FULBRIGHT & JAWORSKI, Los Angeles, CA.

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JUDGES: Before: BROWNING, B. FLETCHER, and SILVERMAN, Circuit Judges.

OPINION: MEMORANDUM *

Peter Sardagna appeals the district court's orders and judgment for Glaziers Plan n1 and CB Richard Ellis granting the Plan equitable relief from an August 1995 Operating Agreement that the court found to be a

prohibited transaction with a party in interest under § 406(a) of ERISA, 29 U.S.C. § 1106(a). The Plan has filed a protective cross-appeal challenging the district court's rejection of its claim that the Operating Agreement was an imprudent transaction that violated § 404(a) of ERISA, 29 U.S.C. § 1104(a). We have jurisdiction pursuant to 28 U.S.C. § 1291, and affirm. Because the parties are familiar with the facts, we recite them only as necessary for this decision.

Sardagna argues that the district court erred in ruling that the statute of limitations was not violated. We review the statute of limitations issue de novo. Pierce County Hotel Employees & Rest. Employees Health Trust v. Elks Lodge, B.P.O.E. No. 1450, 827 F.2d 1324, 1328 (9th Cir. 1987). The three-year statute of limitations started to run on September 1, 1998, when the Plan hired plaintiff CB Richard Ellis, the fiduciary plaintiff in this case, as investment manager of the Plan. 29 U.S.C. § 1113; See Landwehr v. DuPree, 72 F.3d 726, 732 (9th Cir. 1995). This action was timely filed on August 6, 1999. See id.

Sardagna argues that judicial estoppel bars the Plan from seeking to have the August 16, 1995 Operating Agreement declared invalid. We review the district court's rejection of the equitable defense of judicial estoppel for an abuse of discretion. Hamilton v. State Farm Fire & Cas. Co., 270 F.3d 778, 782 (9th Cir. 2001). The equitable doctrine of judicial estoppel "precludes a party from gaining an advantage by asserting one position, and then later seeking an advantage by taking a clearly inconsistent position." Id. The district court did not abuse its discretion in rejecting judicial estoppel because the court did not previously adopt an inconsistent position that the contract was valid, plaintiffs did not recover from the jury for breach of

contract, and validity of the contract was not an issue raised by either party to the court.

Sardagna argues that the agreement was not a prohibited transaction under § 406 because Sardagna was not a party in interest service provider under ERISA. We review the district court's findings of fact for clear error and conclusions of law de novo. Easley v. Cromartie, 532 U.S. 234, 242, 149 L. Ed. 2d 430, 121 S. Ct. 1452 (2001); Donovan v. Mazzola, 716 F.2d 1226, 1228 (9th Cir. 1983); Dubner v. City of San Francisco, 266 F.3d 959, 964 (9th Cir. 2001). Sardagna's claim fails because he was a service provider who rendered continuous services as a real estate consultant for the Plan. See 29 U.S.C. § 1002(14)(B).

Sardagna argues, in the alternative, that his party in interest status ended with the execution of a Termination and Settlement Agreement, which stated that Sardagna was no longer a party in interest under ERISA. However, the parties' legal conclusion or subjective belief that Sardagna was not a party in interest under ERISA does not control. Cf. Thomas, Head & Greisen Employees Trust v. Buster, 24 F.3d 1114, 1119 (9th Cir. 1994) (holding that an alleged fiduciary's state of mind does not determine fiduciary status under ERISA); Acosta v. Pacific Enterp., 950 F.2d 611, 618 (9th Cir. 1991) (stating that "a person's actions, not the official designation of his role," determine fiduciary status). Rather, ERISA defines a party in interest. See 29 U.S.C. § 1002(14). Following the Termination and Settlement Agreement, Sardagna provided the same real estate consulting services that he provided prior to the agreement. Therefore, he remained a service provider party in interest as defined by ERISA after the Termination and Settlement Agreement.

Sardagna argues that the Operating Agreement transaction was exempt from ERISA § 406 because LA MetroMall LLC, the entity created by the Operating Agreement, is a Real Estate Operating Company (REOC) under 29 C.F.R. 2510.3-101. However, the regulation defines the status of assets owned by a REOC when a plan owns an interest in the REOC, not whether or not the transfer of ownership rights and interests to an REOC is for the benefit of a party in interest, such as Sardagna. The Plan owned the Carson Property, through Carson Realty Partners, when the Plan entered into the Operating Agreement. The Carson Property was a plan asset within the meaning of ERISA § 406(a).

Sardagna argues that the district court erred in rejecting his defenses of laches and equitable estoppel because Plan lawyers wrote the Operating Agreement and the Plan waited too long to bring this action. We review a district court's decision to reject equitable estoppel and laches for an abuse of discretion. Brother Records, Inc. v. Jardine, 318 F.3d 900, 909 (9th Cir. 2003); cf. Jarrow Formulas, Inc. v. Nutrition Now, Inc., 304 F.3d 829, 832 (9th Cir.), cert. denied., 154 L. Ed. 2d 520, 123 S. Ct. 600 (2002) (reviewing laches for clear error and an abuse of discretion). The district court did not abuse its discretion in refusing to apply laches or equitable estoppel against the fiduciary plaintiff for the actions taken by the agents of the breaching fiduciaries. Sardagna cannot establish the elements of equitable estoppel against the fiduciary plaintiff for actions taken by the breaching fiduciaries and their agents. Cf. Greany v. W. Farm Bureau Life Ins. Co., 973 F.2d 812, 821 (9th Cir. 1992) (setting forth the elements of federal common law equitable estoppel). Nor has Sardagna established that the fiduciary plaintiff unreasonably delayed in filing this action resulting in prejudice to Sardagna. See Tr. for

Alaska Laborers-Constr. Indus. Health & Sec. Fund v. Ferrell, 812 F.2d 512, 518 (9th Cir. 1987).

Because we affirm the district court's decision, we need not reach the issues raised by the Plan in its protective cross-appeal.

AFFIRMED.

FOOTNOTES

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

n1 Southern California, Arizona, Colorado, and Southern Nevada Glaziers Architectural Metal and Glass Workers Pension Trust.

Case No. CV 99-08045 WJR (CTx)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

THE SOUTHERN CALIFORNIA, ARIZONA, COLORADO, AND SOUTHERN NEVADA GLAZIERS ARCHITECTURAL METAL AND GLASS WORKERS PENSION TRUST, an employee pension benefit plan, CB RICHARD ELLIS, INC., et al.,
Plaintiffs,

v.

PETER SARDAGNA, an individual, LAMM EMPLOYEES, L.P., a California limited partnership, and LAMME, INC., a California corporation,
Defendants.

MEMORANDUM OPINION AND FINAL JUDGMENT

September 17, 2001 Filed

Plaintiffs challenge the propriety of Defendants' participation in the orchestration of real estate investment undertaken, ostensibly, for the benefit of a pension trust. Consequently, Plaintiffs seek equitable relief against Defendants for alleged violations of the Employee Retirement Income Security Act of 1974 ("ERISA") in the form of a decree rescinding and canceling Defendants, interest in LA MetroMall LLC and a declaration that LA MetroMall LLC has title to the Carson property free of any claim or interest of Defendants.

But in light of the jury's verdict in the first phase of the trial, it is now clear that Plaintiffs' ERISA claims are

stale. That is, although Plaintiffs' Complaint alleged that Defendants' conduct occurred over an eight-year period from 1989 to 1997 and therefore fell within ERISA's three-year internal statute of limitations, the jury rejected these claims and absolved the Defendants of any liability with respect to the claims of conspiracy, breach of contract, fraud, and violations under RICO during that time period. Subsequently, Plaintiffs, in the ERISA phase of the trial, predicated their entire claim solely on one event that occurred on August 6, 1995: the enactment of the LA MetroMall LLC Operating Agreement. Consequently, Plaintiffs' ERISA claims, which were not brought until August 6, 1995, are barred by ERISA's three-year statute of limitations.

1. Factual and Procedural History

The relevant facts of this case are, for the purposes of this opinion, relatively simple. Plaintiffs Southern California, Arizona, Colorado, and Southern Nevada Glaziers Architectural Metal and Glass Workers Pension Trust ("Glaziers Plan") and CB Richard Ellis ("CB Ellis") (collectively "Plaintiffs") claim that Peter Sardagna ("Sardagna") along with other Sardagna-controlled and created entities ("Sardagna Entities") (collectively "Defendants") violated ERISA in at least one of three ways. More specifically, Plaintiffs take issue with Defendants' participation in the creation of the August 16, 1995 LA MetroMall LLC Operating Agreement, which allegedly transferred assets initially belonging to the Glaziers Plan to Defendants.

The Glaziers Plan is an employee pension benefit plan created pursuant to the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1002(2)(A). The participants and beneficiaries in the Glaziers Plan are current and retired union workers in the

glassworking and related construction trades in California and other western states. Plaintiff CB Ellis has, since September 1998, served as investment manager of the Glaziers Plan's real estate assets.

The real estate asset at issue in this action is the Carson Property. In September 1989, the Glaziers Plan, through its Trustees, voted to invest $6 million toward the possible purchase of the Carson property. The purchase of this parcel of property involved complex financing because the land was at the time in a bankruptcy estate and environmentally contaminated. These two factors, in addition to the high price of the land if eventually deemed saleable, made the investment undeniably risky. Indeed, an independent real estate adviser, AMCAL, ultimately concluded that any investment in the plan was economically unreasonable in light of the cost of and sources of funds for remediating the land, the sources and availability of financing the purchase price, political risks of the project, the uncertainly of recovering any remediation costs from third parties and, most significantly, the experience (or lack thereof) of the developers.

The developers complained of were, among others, Defendant Peter Sardagna ("Sardagna') and certain Sardagna-controlled entities ("Sardagna Entities") (collectively ~Defendants"). Sardagna was a real estate consultant and former loan officer and mortgage banker. Notably, Sardagna had previously (and unsuccessfully) tried to develop the Carson Property in the 1980's. As a result of this failed attempt to develop the property, Sardagna's project went bankrupt. Sardagna, along with Robert Ferrante ("Ferrante"), who was his partner in the previous failed attempt to develop the Carson property, approached William

Seay ("Seay"), former administrator, investment advisor and manager of the Glaziers Plan, about an investment in the Caron Property. Obviously, Sardagna and Ferrante found a willing participant for the proposal in the Glaziers Plan.

Between 1989 and 1995, The Glaziers Plan continued to invest in the Carson project. Additionally, during this same period the Glaziers Plan continued to compensate Sardagna at approximately $20,000 per month. Notwithstanding these facts, the Glaziers Plan did not see any returns on the initial investments. Surprisingly, the Glaziers Plan nevertheless continued to fund and further involve themselves in the Carson property. in fact, during this time, Sardagna himself referred to the property in its then-unentitled state as a liability rather than an asset.

Late in this six-year period, Sardagna, along with Ferrante and Seay, presented a new deal to the Trustees of the Glaziers Plan. Therein, the Glaziers Plan would: acquire the Carson property outright; would continue to fund unspecified pre-development expenses; upon a sale or securing third-party financing would get back its cash advances plus a 15% return after which Sardagna and/or Ferrante would receive at least most of the profits on the Carson project; the Glaziers Plan would retain 13 acres of the 157-acre Carson property, which would be leased to Sardagna and Ferrante for 65 years at $1 million dollars per year; Sardagna and Ferrante would build a commercial structure on the 13 acres at no expense to the Glaziers Plan; the Glaziers Plan would receive $1 million for each mall that Sardagna and Ferrante develop in the future; and the Glaziers Plan would receive its investment plus a 15% return on any money

advanced for another mall project in New Jersey plus a $1 million bonus.

But ultimately, the Glaziers Plan Trustees approved a similar but different deal on August 16, 1995. The final deal (i.e., the LA MetroMall Operating Agreement), which was undisputably approved, required the Glaziers Plan to transfer its contractual rights in the Carson Property to the Defendants. The Glaziers Plan would be a managing member in an entity created to hold this property and Sardagna would be a non-managing member. In return, Sardagna would make only a minimal capital contribution. The Glaziers Plan would, in the great majority, continue to fund the project and would have a 99% interest and Sardagna a 1% interest until the Glaziers Plan recouped its initial investment. At that point, the ownership would flip and Sardagna would possess 99% of the interest. Additionally, during this period, Sardagna would be compensated handsomely.

As could have been predicted, the Carson project has not, thus far, resulted in any profit; indeed, it has resulted in a significant loss of almost $3 million. That is, evidence at trial showed that the property is worth less today than the sum of the Glaziers Plan investments to date.

Significantly, however, after the completion of the LA MetroMall Operating Agreement on August 16, 1995, only a couple of significant things occurred. First, the Glaziers Plan fired Seay and hired CB Ellis. This occurred in 1998. All other material facts had taken place by August 16, 1995. Second, the Plaintiffs filed this action, almost four years later, on August 6, 1999.

Then, at the eve of trial, Plaintiffs settled their claims against Seay and Ferrante. Consequently, this action proceeded against the Defendants only. The case was ultimately bifurcated. Plaintiffs' claims that Defendants breached the contract (i.e., the Operating Agreement), committed fraud, violated the Racketeer Influenced and Corrupt Organizations Act (RICO") and conspired to do the same were tried to a jury. The jury found in favor of Defendants on all counts. Subsequently, Plaintiffs' ERISA claims were tried to this Court.

III. Discussion

Although the case is primed to be resolved on the merits, Defendants have made various arguments to support the conclusion that this Court may resolve this matter without reaching its merits. Specifically, Defendants argue, as it did for the first time during its closing arguments, that this lawsuit is time barred. That is, Defendants contend that now that the factual record has been sufficiently developed, it is apparent that this claim is untimely under ERISA's three-year statute of limitations.

It is clear that ERISA and its internal statute of limitations applies to this case. See Landwehr v. Dupree, 72 F.3d 726 (9th Cir. 1995) (applying ERISA's three year statute of limitations to nonfiduciary actions). Indeed, the parties do not dispute that this case, in order to be timely, must have been filed within three years of the date that the Plaintiffs knew or should have known of the breach or violation. See 29 U.S.C. § 1113. Additionally, the parties agree that the Glaziers Plan's Trustees actually knew of the LA MetroMall Operating Agreement on August 16, 1995. That is, the Trustees had actual knowledge of the breach or violation that they now complain of on

August 16, 1995 - - almost four years before filing the lawsuit. Therefore, Defendants during closing arguments and in their post-trial briefs argued that this case should be dismissed (because it is barred by ERISA's three-year statute of limitations.

Clearly, the success of the Defendants' statute of limitations defense hinges upon the validity of the Plaintiffs' two arguments to defeat it. First, Plaintiffs argue that they did not violate the statute of limitations because this suit was brought by CB Ellis, who did not have actual knowledge until September, 1998. Second, Plaintiffs argue that Defendants' have waived their statute of limitations argument by waiting until the trial to raise it. These arguments will be considered in turn below.

A. Application of Statute of Limitations

As explained briefly above, Defendants argue that this Court should dismiss the Plaintiffs' ERISA claims. Specifically, Defendants argue that Plaintiffs' remaining ERISA causes of action are time barred. Pursuant to 29 U.S.C. § 1113, "[n]o action may be commenced under this chapter with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part, or with respect to a violation of this part, after . . . three years of the earliest date on which the plaintiff had actual knowledge of the breach or violation." Id. Defendants contend that Plaintiffs have had actual knowledge of the alleged violations since August 16, 1995. That is, Defendants contend that the real parties in interest - - namely, the Glaziers Plan - - had actual knowledge of the relevant facts, through its Trustees, more than three years prior to filing this lawsuit. Defendants posit, then, that because Plaintiff CB Ellis is

representing the Glaziers Plan in this lawsuit, they must necessarily adopt their statute of limitations. In other words, Defendants contend that determining when the Plaintiffs (i.e., CB Ellis) acquired actual knowledge of the alleged violations is irrelevant; rather, Defendants claim that because CB Ellis' claim is brought on behalf of the Glaziers Plan's claims, the clock should start running when the Glaziers Plan had actual knowledge. Accordingly, Defendants urge this Court to dismiss Plaintiffs' complaint as barred by ERISA's statute of limitations.

In response, Plaintiffs argue that under Ninth Circuit law, the statute of limitations for a claim under ERISA does not begin to run until the named plaintiff has actual knowledge. Thus, since CB Ellis is the named Plaintiff rather than the Glaziers, this Court should focus only on when CB Ellis possessed actual knowledge sufficient to start the clock. CB Ellis contends that it acquired actual knowledge of the ERISA violations in September, 1998.

In resolving statute of limitations issues under ERISA, the Ninth Circuit has developed a two-step analytical framework. See Ziegler v. Connecticut Gen. Life Ins. Co., 916 F.2d 548, 550 (9th Cir. 1990). The first step in the analysis is to "isolate and define the underlying violation." Meagher v. International Ago In of Machinists and Aerospace Workers Pension Plan, 856 F.2d 1418, 1422 (9th Cir. 1988). Once it has been identified, the court must determine, first, when the breach or violation occurred and, second, when the plaintiff had actual knowledge of it. See, Ziegler, 916 F.2d at 550. See also Maher v. Strachan Shipping Co., 68 F.3d 951, 954 (5th Cir. 1995) ("The statute specifies a two-step analysis of accrual of an ERISA action: first, when did the alleged breach or violation occur;

and second, when did the plaintiff have actual knowledge of the breach or violation?") (citing Ziegler, 916 F.2d at 550); Gluck v. Unisys Corp., 960 F.2d 1168, 1178 (3rd Cir. 1992) (stating that once the breach has been identified, "[t]wo temporal determinations must then be made: the date of the last action which formed a part of the breach and the date of the plaintiffs actual knowledge of the breach.") (citation omitted).

Thus, following the Ninth Circuit's framework, the first step is to determine when the actual breach, if any, occurred. IT is undisputed that the alleged breach or violation occurred, if at all, on August 16, 1995. That day, the Glaziers Plan's Trustees came to an agreement, as is detailed above, with the Defendants regarding financing of the Carson project and embodied that agreement in the LA MetroMall LLC Operating Agreement. This places the alleged breaches or violations within the six year statute of limitations period provided by ERISA.

The next step, then, is to determine when Plaintiffs actually knew of the Defendants alleged misconduct. Plaintiffs do not dispute that the Glaziers Plan learned of the wrongful transaction at issue in this matter on September 16, 1995, when the Glaziers Plan's Trustees became parties with Defendants to the Operating Agreement. Instead, they contend that the relevant inquiry is when the named Plaintiffs to this lawsuit--that is, CB Ellis--had actual knowledge that something was wrong rather than when the Glaziers realized that the misconduct had occurred. As support for this proposition, Plaintiffs rely on the rule announced in Landwehr v. DuPree, 72 F.3d 726, 732 (9th Cir. 1995). Therein, the Ninth Circuit held that ERISA's "statute of limitations period begins to run on the date that the person bringing the suit on behalf of the plan learned

of the breach or violation." Id. (emphasis added). Therefore, according to Plaintiffs, the statute of limitations did not begin to run until CB Ellis obtained knowledge of the alleged violations underlying this action. If this argument is correct, then the statute of limitations would have started running in September, 1998, when CB Ellis was hired to replace the Glaziers Plan's fiduciaries and the instant lawsuit would not be barred by the statute of limitations.

In Landwehr, the defendants argued that the statute of limitations should start running from the first day that the plan, through any of its agents, learned of the breach. Id. at 732. In other words, defendants argued that the statute of limitations would begin running on the first date that any plan fiduciary or other agent of the Plan had actual knowledge of the violation notwithstanding the fact that this theory would start the clock when the defendants themselves acquired knowledge of the breach. The Ninth Circuit reasoned that the defendant's position would lead to the absurd result that an individual's commission of the violation would necessarily trigger the clock for statute of limitations purposes. Under such a rule, the "actual knowledge" provision would be read out of the statute leaving only the commission of the conduct to start the clock. The Ninth Circuit concluded that this was clearly not Congress' purpose as evident by the inclusion of the "actual knowledge" provision in Section 1113.Id. at 733.

Thus, in Landwehr, the Ninth Circuit rejected the notion that a plaintiff could be required to assume an adversary's position vis-a-vis the statute of limitations. Indeed, the Ninth Circuit recognized that such a requirement would unfairly "undermine one of the primary purposes of ERISA: To protect pension plans

from looting by unscrupulous employers and their agents." Id. Accordingly, the Ninth Circuit realized that starting the clock on ERISA claims by any party to the plan's actual knowledge would eviscerate the statutory mandate that the time limit not start until the plaintiff has actual knowledge.

But in this case, the same concerns do not surface. Here, unlike in Landwehr, CB Ellis retains an identity of interests with the Glaziers Plan. That is, CB Ellis' claims against Defendants are purely derivative of the Glaziers Plan's claims; in fact, CB Ellis is serving as the Glaziers Plan's representative. In this case, CB Ellis will rely on the identical facts to argue the identical legal issues in the hope of achieving an identical end. In short, the CB Ellis' claims and the Glaziers' claims are perfectly coterminous. Moreover, CH Ellis is bringing these claims on behalf of the Glaziers Plan. In other words, they are working together on this case. The Glaziers Plan has effectively transferred their interests in this case to CB Ellis.

Notwithstanding this distinction, the instant case is, nevertheless, similar to Landwehr in one crucial respect: in both cases under one party's theory there exists the possibility of frustrating the Congressional purpose of including a statute of limitations that is keyed to a party's actual knowledge. That is, under the defendant's theory in Landwehr, the actual knowledge requirement would be read out of the statute and replaced solely with a focus on the occurrence of the breach. Similarly, under CB Ellis' position, parties could always transfer their claims to be brought by another party who would get a fresh three years under the actual knowledge clause of the statute of limitations. The effect of this theory would

be to replace the actual knowledge provision with only the six year commission of the violation statute of limitations. Thus, CB Ellis, theory would similarly frustrate Congress' provision of both a six-year statute of limitations based upon the actual commission of the breach and the inclusion of a three-year statute of limitations that rests upon a party's actual knowledge.

Indeed, the Landwehr Court recognized that its rule was subject to exception where "application of [the] rule would frustrate the statutory purpose." Id. This appears to be precisely the type of case that the Ninth Circuit had in mind when it issued this warning. Allowing the Glaziers Plan to avoid the statute of limitations merely by eliciting the assistance and representation of a new plan fiduciary would clearly, as discussed above, frustrate Congress' purpose of including a statute of limitations keyed to a party's actual knowledge. Accordingly, this Court holds that the Glaziers Plan's undisputed actual knowledge of the alleged misconduct that occurred on August 16, 1995, is imputed to CB Ellis because the parties are for all relevant purposes identical and allowing otherwise would frustrate Congress' purpose of including a statute of limitations tied to the injured party's actual knowledge.

B. Waiver of Statute of Limitations Defense

Having resolved the previous issue in favor of the Defendants, the Court must now considered whether Defendants waived this affirmative defense by waiting until the trial (or, to be precise, the close of trial) to raise it, Plaintiffs argue that the statute of limitations defense must be raised, as an affirmative defense, no later than in the Pre-Trial Conference Order. Of course, Defendants disagree; instead, Defendants

argue that the Ninth Circuit has liberalized the standard for raising affirmative defenses and has allowed such affirmative defenses to be raised at anytime during a case's pendency in the district court.

Federal Rule of Civil Procedure 8(c) requires that the affirmative defense of the statute of limitations be raised in the initial pleading tendered by the defendant. Significantly, the Ninth Circuit liberalized the requirement that affirmative defenses be raised in a defendant's initial pleading in Healy Tibbitts Construction Co. v. Insurance Co. of North America, 679 F.2d 803 (9th Cir.1982). There, the Ninth Circuit allowed the defendant insurance company to raise the affirmative defense that the insurance policy exclusion clause precluded his recovery by way of a motion for summary judgment despite the fact that this defense was not among the seven affirmative defenses that the defendant raised in its answer to the plaintiff's initial complaint.

More recently, the Ninth Circuit again affirmed its position that defendants, who fail to plead an affirmative defense in the answer as per Federal Rule 8(c), may nevertheless raise an affirmative defense for the first time before or at trial so long as the delay does not prejudice the plaintiff. See Magana v. Commonwealth of the Northern Mariana Islands, 107 F. 3d 1436, 1446 (9th Cir. 1997) (citing Rivera v. Anava, 726 F.2d 564, 566 (9th Cir. 1984)); United States v. LeMaux, 994 F.2d 684, 689-90 (9th Cir. 1993) (citing United States v. Akmakiian, 647 F.2d 12, 14 (9th Cir. 1981), cent. denied, 454 U.S. 964, 102 S. Ct. 505, 70 L.ed2d 380 (1981)); United States v. DeTar, 832 F.2d 1110, 1114 (9th Cir. 1987) (citing United States v. Mino, 756 F.2d 731, 737 (9th Cir. 1985), vacated on other grounds, 474 U.S. 991, 106 S. Ct. 401, 88

L.Ed.2d 353 (1985). Thus, it is clear that in this case Defendants have not waived the affirmative defense based upon the statute of limitations merely by raising it during the trial so long as there is no prejudice to Plaintiffs.

Here, it is clear that there is no prejudice to Plaintiffs. Plaintiffs have had, via post-trial briefing, a full opportunity to argue why the statute of limitations should not apply. Additionally, there are no facts that needed to be developed that have not been so developed that would prevent the fair resolution of this question. In fact, Defendants raised their statute of limitations defense at the earliest possible opportunity. Raising it earlier would have been futile. See United States v. Manning, 56 F.3d 1188, 1189-90 (9th Cir. 1995) (holding that defendant did not waive statute of limitations defense where it would have been futile to raise it). Indeed, the Manning court held that "[b]ecause it would have been futile for [defendant] to raise a statute of limitations defense at trial, we hold that he did not waive the defense." Id. at 1189. As support for this argument the Manning Court logically reasoned that a defendant cannot waive an affirmative defense under such circumstances "because there [is] nothing to waive." Id, In the instant case there is no difference. Defendants could not have raised a statute of limitations defense before the jury's verdict in the first phase of the trial because until then there was no basis to label the ERISA causes of action untimely. Therefore, this Court holds that the statute of limitations defense was not waived.

IV. Conclusion

Based on the forgoing, it appears that Plaintiffs' ERISA claims must fail. ERISA's internal three-year

statute of limitations applies and thus bars these claims. Therefore, this Court finds in favor of the Defendants and against the Plaintiffs on the remaining claims contained within Plaintiffs' Complaint.

IT IS SO ORDERED.

DATED: September 17, 2001

WILLIAM J. REA
United States District Judge

Case No. CV 99-08045 WJR

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

THE SOUTHERN CALIFORNIA, ARIZONA, COLORADO, AND SOUTHERN NEVADA GLAZIERS ARCHITECTURAL METAL AND GLASS WORKERS PENSION TRUST, an employee pension benefit plan, CB RICHARD ELLIS, INC., et al.,
Plaintiffs,

v.

WILLIAM L. SEAY, an individual, et al.,
Defendants.

JUDGMENT ON JURY VERDICT

Oct 15, 2001 Filed

This action came on for trial before the Court and a jury, Honorable William J. Rea, District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

IT IS ORDERED AND ADJUDGED

that, as to Plaintiffs' claims for breach of contract, fraud and RICO, Plaintiffs take nothing, that the action be dismissed on the merits. and that Defendants recover of Plaintiffs their costs of action.

IT IS SO ORDERED.

DATED: October 11, 2001.

WILLIAM J. REA
United States District Judge

Case No. CV 99-08045 WJR

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

THE SOUTHERN CALIFORNIA, ARIZONA, COLORADO, AND SOUTHERN NEVADA GLAZIERS ARCHITECTURAL METAL AND GLASS WORKERS PENSION TRUST, an employee pension benefit plan, CB RICHARD ELLIS, INC., et al.,
Plaintiffs,

v.

WILLIAM L. SEAY, an individual, et al.,
Defendants.

JUDGMENT ON DECISION BY THE COURT

Oct 15, 2001 Filed

This action came on for trial before the Court, Honorable William J. Rea, District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED

that, as to Plaintiffs' ERISA claims, Plaintiffs take nothing, that the action be dismissed on the merits, and that Defendants recover of Plaintiffs their costs of action.

IT IS SO ORDERED.

DATED: October 11, 2001

WILLIAM J. REA
United States District Judge

Case No. CV 99-08045 WJR (CTx)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

THE SOUTHERN CALIFORNIA, ARIZONA, COLORADO, AND SOUTHERN NEVADA GLAZIERS ARCHITECTURAL METAL AND GLASS WORKERS PENSION TRUST, an employee pension benefit plan, CB RICHARD ELLIS, INC., et al.,
Plaintiffs,

v.

PETER SARDAGNA, an individual, LAMM EMPLOYEES, L.P., a California limited partnership, and LAMME, INC., a California corporation,
Defendants.

ORDER RE PLAINTIFF CB ELLIS INVESTORS, LLC'S MOTION TO ALTER AND AMEND THE JUDGMENT OR, ALTERNATIVELY, FOR A NEW TRIAL ON THE ISSUE OF THE STATUTE OF LIMITATIONS

December 4, 2001 Filed

Plaintiffs' instant motion requests this Court to alter and amend its judgment, as reflected in the Court's September 18, 2001 Memorandum Opinion And Final Judgment ("September 18 Order"), regarding Defendants' statute of limitation defense. Plaintiffs also request that this Court resolve Plaintiffs' ERISA claims on the merits.

I. BACKGROUND

On August 6, 1999, Plaintiffs Southern California, Arizona, Colorado, and Southern Nevada Glaziers Architectural Metal and. Glass Workers Pension Trust ("Glaziers Plan"), an employee pension benefit plan, and CB Richard Ellis ("CB Ellis") (collectively, "Plaintiffs") filed a complaint that alleged, among other things, that Peter Sardagna ("Sardagna") and other Saradagna-controlled and created entities (collectively, "Defendants") violated various provisions of the Employee Retirement Income Security Act ("ERISA"). Specifically, Plaintiffs take issue with Defendants, participation in the creation of the August 16, 1995 LA MetroMall LLC Operating Agreement ("LA MetroMall LLC Transaction"), which allegedly transferred Glaziers Plan assets to Defendants.

The transaction at issue revolved around a parcel of real property, the Carson Property. Between 1989 and 1995, the Glaziers Plan, through its trustees, invested millions in the Carson Property pursuant to a proposal presented by Defendants and 'others. The deal that culminated all the activity during the preceding six years - - i.e., the LA MetroMall LLC Transaction -required the Glaziers Plan to transfer its contractual rights in the Carson Property to Defendants. However, the Glaziers Plan would retain a 99% interest and Sardagna a 1% interest until the Glaziers Plan recouped its initial investment. After that, the ownership interests would flip and Sardagna would possess a 99% interest in the property. However, the Carson Property has not, to date, resulted in any profit.

Following the August 16, 1995 LA MetroMall LLC Transaction, only a few notable events have occurred. First, in 1998, the Glaziers Plan fired William Seay ("Seat'"), former plan administrator, investment advisor and plan manager, and hired CB Ellis as a successor investment manager in September 1998. Second, Plaintiffs filed this action on August 6, 1999, almost four years after the alleged breach or violation.

In the jury trial against Defendants, the jury found in favor of Defendants on all claims, including breach of contract, RICO violations and conspiracy. Subsequently, Plaintiffs' ERISA claims were tried to this Court. On September 18, 2001 this Court disposed of Plaintiffs' ERISA claims on the ground they were barred by the applicable statute of limitations. Plaintiffs' instant motion requests, in essence, a re-examination of that ruling and a disposition of the ERISA claims on their merits.

II. DISCUSSION

A. Statute of Limitations

In its September 18 Order, this Court ruled that Plaintiffs' claims were barred by the ERISA three-year statute of limitations because the Glaziers Plan - - arguably, the real party in interest - - had knowledge, through its trustees, of the relevant facts giving rise to its ERISA claims more than three years prior to the filing of this lawsuit.

Plaintiffs argue that this Court's ruling in that regard should be amended. because, under Landwehr v. DuPree, 72 F.3d 726, 732 (9th Cir. 1995), the clock starts to run when the named plaintiff - - here, CB

Ellis, the successor investment manager for the Glaziers Plan - - obtained actual knowledge of the alleged breach or violation. CB Ellis was retained by the Glaziers Plan in September 1998; this action was filed on August 6, 1999. Accordingly, if, under Plaintiffs' theory, the clock started running on September 1, 1998 (the first conceivable day CB Ellis could have learned of any breach or violation), Plaintiffs' action would be timely as it would be filed within three years of the date on which the named plaintiff gained actual knowledge. After serious consideration, the Court agrees with Plaintiffs and hereby amends its judgment accordingly.

The Landwehr court stated:

> We now expressly hold that the limitations period in an ERISA action begins to run on the date that the person bringing the suit learns of the breach or violation. It is true that beneficiaries, participants, and fiduciaries of an ERISA plan ordinarily may bring an action for breach of fiduciary duty only on behalf of an ERISA covered plan and not in their individual capacities. Similarly, actions for engaging in prohibited transactions ordinarily may be brought only on behalf of a covered plan. The plaintiff in such actions, however, is not he plan itself but the fiduciary, beneficiary, or participant bringing the suit. In this case, the plaintiffs are Landwehr and Cole and not the Plan. Thus, the statute of limitations started to run on the first date that either Landwehr or Cole had actual knowledge

> of the alleged violation, regardless of whether any Plan fiduciary or service provider knew of the violation before that date.

Landwehr, 72 F. 3d at 732 (citations omitted). Without rehashing the factual background of the Landwehr case, the Court finds it to be more on all fours with this case than originally suggested. Specifically, as Landwehr states, "[i]f the statute of limitations started to run on the first day that a fiduciary knew of the violation, then the statute of limitations would begin to run on the date that [the fiduciary] breached his duties . . .. That would obviously defeat the purpose of section 1113's requirement that the limitations period run from the date when the plaintiff acquired actual knowledge of the breach, rather than on the date of the breach." Id. at 732-33.

Here, the only people Sardagna claims had knowledge of the breach or violation prior to the arrival of CB Ellis are the wrongdoing fiduciaries. And, although this case is unusual in that the wrongdoing fiduciaries are not named defendants, that does not compel the conclusion that their knowledge should be imputed to others. To be sure, if the wrongdoing fiduciaries were named defendants, under Landwehr, it appears Sardagna would be hard-pressed to argue that their knowledge should be imputed to the plaintiffs. Accordingly, the Court is not convinced that the fact that they are not named defendants renders a different conclusion. Certainly, Sardagna has .not presented authority supporting such a position.

Moreover, although, as the Court recognized previously, CB Ellis' position is aligned with that of the Glaziers Plan, that does not mean CB Ellis is

aligned with the wrongdoing . fiduciaries. Therefore, the Court distinguishes between the knowledge of the wrongdoing fiduciaries and all others. There is no evidence that anyone other than the wrongdoing fiduciaries had knowledge of the alleged violation prior to CB Ellis' arrival. Accordingly, the only party's knowledge the Court finds relevant to the statute of limitations issue is the knowledge of CS Ellis.

Furthermore, the Court is not convinced that this conclusion results in a situation where "any Plan could extend its period of limitations indefinitely, simply by firing one administrator and hiring a new one, and then another, ad infinitum." (Sardagna post-Trial Reply at 4.) First, ERISA imposes a maximum six-year statute of limitations on all ERISA actions: all ERISA claims must be brought within six years from the date of the alleged breach or violation. 29 U.S.C. § 1113(1). Therefore, the maximum time extension a plaintiff might obtain is six years. Second, in a case where there is evidence to suggest that the plaintiff is engaging in such unsavory conduct, as the Landwehr court noted, the courts "will surely be able to apply [the Landwehr rule] in a manner that does not permit such a result.,, Landwehr, 72 F.3d at 733. Sardagna has presented no evidence that such shinanigans have occurred here, so there is no need for the Court to concern itself with the unknown.

Accordingly, the Court finds that this action was timely brought within three years of the named plaintiff - - CB Ellis obtaining actual knowledge of the alleged breach or violation Having so found, the Court will now address the merits of the parties' other arguments raised in connection with Plaintiffs' ERISA claims.

B. Judicial Estoppel

In the Ninth Circuit, the doctrine of judicial estoppel "precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position." Risetto v. Plumbers & Steamfitters Local 343, 94 F.3d 597, 600 (9th Cir. 1996).

Defendants argue that Plaintiffs' ERISA claims are barred by the doctrine of judicial estoppel. Specifically, Defendants contend that by first asserting a breach of contract claim, which arguably presumes the existence of a valid contract, Plaintiffs cannot now pursue an allegedly inconsistent position that under ERISA the contract is invalid.

Plaintiffs respond that the Ninth Circuit recently embraced the position that judicial estoppel applies to bar a plaintiff from pursuing an inconsistent position only where the previous position was adopted by the court. See Masayesva v. Hale, 118 F.3d 1371, 1382 (9th Cir. 1997).

The Court is not convinced - - for several reasons - - that judicial estoppel appropriately applies to this case. First, although Risetto did not specifically address whether a court must first adopt one of. the two "inconsistent" positions before applying the doctrine of judicial estoppel, Masayesva reached this issue and is not inconsistent with the court's holding in Risetto. Accordingly, the Court is persuaded that in order for the doctrine of judicial estoppel to apply, one of the two positions must have been adopted previously by the court.

Second, consistent with the policies underlying judicial estoppel, and as reflected even in the cases cited by Defendants, the doctrine is designed to prevent a plaintiff from recovering twice on inconsistent positions. That risk clearly is not at issue here. Indeed, the jury rejected Plaintiffs' breach of contract claim;[1] therefore, Plaintiffs recovered nothing from taking that position. Accordingly, despite Defendants' argument to the contrary, the Court finds it of considerable moment "that (Plaintiffs] were unsuccessful in establishing their claim for damages for breach of contract before the jury." (Defts' Post Trial Br. at 6.)

Third, the validity of the contract subject to Plaintiffs breach of contract claim appears to have never been raised - - by either party - - as an issue. Defendants claim that they were

> required by the Court to defend against that claim before the jury, and did so, not on any theory that the contracts were invalid, but solely on the ground that his debts and notes were understood to be payable only out of his share of the proceeds when the Carson property was sold or developed. The jury found for him on the claim for breach of contract, solely on the basis of this defense.

(Defts' Post-Trial Reply at 6.) The Court is not persuaded that, due to these circumstances, Plaintiffs "gained substantial advantage over Sardagna, and caused him very substantial detriment." (Defts' Post-Trial Br. at 6.) Certainly, contract invalidity would be an appropriate defense to a breach of contract claim.

The fact that the Sardagna Defendants failed to raise such a defense is not the fault of this Court or Plaintiffs.

Accordingly, the Court finds that the doctrine of judicial estoppel does not apply in this instance to bar Plaintiffs' ERISA claim.

C. Jury Verdict Preclusion

As both parties acknowledge, the Seventh Amendment entitles a party to a jury trial regarding all factual issues that relate to both legal and equitable claims; moreover, the jury's findings on those factual issues are binding as to the equitable claims. Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959). However, as Plaintiffs correctly point out, the "existence of common factual issues is to be distinguished from the existence of overlapping evidence. For purposes of the Seventh Amendment, the question is whether factual issues overlap, thus requiring one trier-of-fact to decide a disputed issue that must be decided by a subsequent jury, not whether the two fact-finders will merely have to consider similar evidence in deciding distinct issues." Allison v. Citgo Petroleum Corn., 151 F.3d402, 423 n.21 (5th Cir. 1998).

Defendants claim that the jury's verdict - - which was in favor of Defendants on all claims - - is binding on this Court's resolution of Plaintiffs' ERISA claims. However, the Court is not convinced that Plaintiffs' ERISA claims involves the same factual issues as Plaintiffs' previously litigated claims. The Court does not take issue with Defendants' assertion that "[t]he summary of evidence set forth in support of each ERISA claim is identical to the summary of evidence

set forth in support of every other ERISA claim and is also identical to the summary of evidence set forth in support of the fraud and RICO claims." (Defts' Post-Trial Br. at 13.) But the flaw in Defendants' argument is apparent from the face of their assertion: The issue is not whether the same evidence is relevant to both the legal and equitable claims; the issue is whether both claims involve the same factual issues. The Court finds that Plaintiffs' ERISA claims involve different factual issues from those presented to the jury. Accordingly, the Court concludes that Plaintiffs' ERISA claims are not precluded by the jury's verdict; the Court may resolve this claim.

D. LA MetroMall LLC Transaction As A "Prohibited Transaction" Under ERISA § 406

Section 406 of ERISA prohibits any financial or property transaction between a plan and a "party in interest." 29 U.S.C. § 1106 (a)(1). A party in interest is defined to include plan fiduciaries and those who, although not fiduciaries, provide services to the plan. 29 U.S.C. § 1002(14)(A) & (B).

Defendants claim that, as concerns them, as a matter of law the LA MetroMall LLC Transaction was not a prohibited transaction because Sardagna was .neither a plan fiduciary nor a service provider. Plaintiffs argue to the contrary.

1. Sardagna as a plan fiduciary

Under ERISA section 3(21)(A), and as relevant in this action, an ERISA fiduciary is one who "renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property . . .." 29 U.S.C. § 1002(21)(A). The Ninth

Circuit has enumerate five factors to be considered in evaluating a person's fiduciary status: (i) providing individualized investment advice, (ii) advice given pursuant to a mutual understanding, (iii) advice provided on a regular basis, (iv) advice pertained to the value of property or consisted of recommendations as to the advisability of investing in certain property, and (v) advice rendered for a fee. Thomas, Head & Greisen Employees Trust v. Buster, 24 F.3d 1114, 1117 (9th Cir. 1994). All five factors must be present to support of finding of fiduciary status. Although neither party addresses these factors completely, the Court will do so here.

a. individualized investment advice

The regulations interpreting ERISA provide that a person may attain fiduciary status by rendering individualized investment advice "based on the particular needs of the plan regarding such matters as, among other things, investment policies or strategy, overall portfolio composition, or diversification of plan investments." 29 C.F.R. 9 2510.3-21(c) (1) (B).Plaintiffs have presented no evidence indicating that Sardagna provided advice as to investment strategy, overall portfolio composition or diversification of assets. Rather, Sardagna more appropriately acted as a real estate consultant by providing information and assisting in the entitlement process regarding the Carson Property. Accordingly, the Court finds that Sardagna did not provide individualized investment advice.

b. mutual agreement

For a party to acquire fiduciary status through function, "[a]n agreement or understanding must have existed between the

parties, not necessarily that (the defendant) would serve as a fiduciary, but that [he] would provide to the Plan individualized investment advice which would be the primary basis for the Plan's investment decisions." Thomas, Head, 24 F.3d at 1119 (quoting Farm King Supply, Inc. v Edward D. Jones & Co., 884 F.2d 288, 293 (7th Cir. 1989)).

There are no facts here suggesting that the requisite mutual agreement existed between Plaintiffs and Defendants. indeed, Plaintiffs do not dispute Defendants'. assertion that various trustees - - who were present at the time the LA MetroMall LLC Transaction was entered into - - testified that they did not look to or rely on Sardagna for investment advice. Moreover, and not surprisingly, Sardagna also claims that he was never asked to provide such advice. Under these circumstances, the Court is hard-pressed to find a mutual agreement regarding Sardagna's role in rendering investment advice.

c. "regular basis" requirement

A finding that the investment advisor rendered advice on a "regular basis" is essential to a determination that a fiduciary relationship existed. Thomas. Head, 24 F.3d at 1119 (citing Am. Fed'n of Union Local 102 v. Equitable Life Assurance Soc'y, 841 F.2d 658, 664 (5th Cir. 1988)). Plaintiffs appear to make much of the fact that "from 1989 through 1997 Sardagna appeared before the Trustees on more than 12 occasions and spoke to the Trustees about the Plan's Carson investment." (Pltfs' Post-Trial Br. at 26.) However, the Court is not convinced that twelve meetings over the course of nine years meets the regular basis requirement contemplated by this factor. Moreover, it is not at all clear that each of

these meetings involved investment advice as compared to informational discussions regarding the Carson Property. Therefore, the Court finds that Sardagna did not render investment-type advice on a regular basis.

d. advice as to value of securities

"A person shall be deemed to be rendering 'investment advice'" if he advises "as to the value of securities or other property, or makes recommendation [s] as to the advisability of investing, purchasing, or selling securities or other property." 29 C.F.R. § 2510.3-21(c) (1) (i).

Although Sardagna provided information to Plaintiffs regarding the Carson Property, the Court is not convinced that this information was provided in the context of investment advice. Moreover, the Court is not persuaded that Sardagna made recommendations as to the advisability of investing in the Carson Property. The fact that Sardagna gave presentations to the Plaintiffs at "critical junctures" is of no moment. Indeed, it is entirely reasonable to presume Plaintiffs desired informational updates prior to making important decisions. The temporal proximity of those discussion to key decisions does not automatically transform those discussions into investment advice. Accordingly, the Court finds that Sardagna did not provide the sort of investment advice contemplated by ERISA.

e. receipt of compensation

ERISA provides that a person is a fiduciary if "he renders investment advice for a fee or other

compensation, direct or indirect." 29 U.S.C. § 1002 (21) (A) (ii).

There is no indication that Sardagna was hired to render investment advice. Notwithstanding the Court's previous finding, to the extent Sardagna offered any investment advice, he was not required or expected to do so, and he was not compensated according to the advice given. The fact that he was paid a fee by Plaintiffs does not constitute the "fee" the ERISA statute contemplates for creating a fiduciary relationship between an investment advisor and an ERISA plan. Therefore, the Court finds that this factor-is not met here.

Review of the five requisite elements leads the Court to conclude that Sardagna did not render individualized investment advice for a fee within the meaning of ERISA. Accordingly, the. Court finds that Sardagna did not operate in a fiduciary relationship with the Plaintiffs.

2. Sardagna as a service provider

Service providers are deemed to be parties-in-interest under the ERISA statutes. 29 U.S.C. § 1002(14)(H). Plaintiffs claim that Sardagna was a service provider to the Glaziers Plan in that he engaged in activities crucial to obtaining entitlements and financing for the Carson Property, which were critical to making the Glaziers Plan investment a successful one. In response, Defendants contend that any services by Sardagna were rendered only to Carson Realty Partners 1989 LP, simply a borrower from Plaintiffs.

The Court hereby ORDERS that the parties submit further briefing on the issue of whether Sardagna is a

service provider under ERISA. Specifically, Sardagna's role appears to be different from that of an accountant or bookkeeper who provides a service to a plan on a regular and continuous basis, and does so independent of a specific plan investment or transaction. The Court is concerned that finding Sardagna to be a service provider, and thereby making any transaction between the Glaziers Plan and Sardagna a prohibited one, would render many transactions between an ERISA plan and a third party - - who presumably is at the other end of the deal - - prohibited ones. Accordingly, the Court orders that Plaintiffs file and serve further briefing on this issue by December 17, 2001. Sardagna is ordered to file and serve his opposition by January 4, 2002. Thereafter, the Court will issue a written order.

3. LA MetroMall LLC as a REOC

Sardagna contends that, regardless of whether he is found to be a fiduciary or service provider/party-in-interest, the LA MetroMall LLC Transaction did not involve a plan asset, and, therefore, was not prohibited under ERISA because LA MetroMall LLC was formed as an ERISA-qualified real estate operating company ("REOC"). The Court is not persuaded that Sardagna has sufficiently established that LA MetroMall LLC meets the definition of a REOC under the Regulations defining "plan assets." 29 C.F.R. § 2510.3-101. For example, Sardagna has not presented adequate evidence indicating that LA MetroMall LLC met the initial and annual tests under 29 C.F.R. 9 2510.3-101(d)(5). Accordingly, the Court is not convinced that LA MetroMall LLC was an ERISA-qualified REOC.

Under these circumstances, the Court finds that the LA MetroMall LLC Transaction involved the transfer of plan assets as defined under the ERISA statutes. The Court reserves judgment on whether the LA MetroMall LLC Transaction is therefore prohibited pending further briefing as requested above.

E. LA MetroMall LLC Transaction As An Imprudent Transaction" Under ERISA § 404

Under ERISA, a fiduciary is obligated to "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and . . . with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of enterprise of a like character and with like aims." 29 U.S.C. § 1104 (a) (1)(B).

Although the Court previously concluded that Sardagna was not a fiduciary to the Glaziers Plan under ERISA, supra Section II.D.1, pursuant to section 502(a) (3) of ERISA, Plaintiffs may still seek equitable relief from Sardagna for allegedly knowingly participating in breaches of fiduciary duties by Seay and Glazier trustees. 29 U.S.C. § 1132 (a) (3).

Assuming - - without specifically deciding - - the LA MetroMall LLC Transaction was imprudent, the Court is not convinced that Sardagna knowingly participated in any fiduciary breach. To be sure, although Sardagna - - as he concedes - - knew that Seay and the Glaziers Plan trustees owed fiduciary duties to the plan, there is not sufficient evidence supporting the contention that he knowingly participated in their breaches.

Indeed, Sardagna met with the Glaziers Plan trustees only approximately twelve times in nine years. It can hardly be said that such interaction is sure to reveal information regarding every aspect of independent investigation and acts of prudence that Seay and the Glaziers Plan trustees were obliged to conduct.

That Sardagna may have known that the Glaziers Plan trustees (i) acted contrary to the advice of their independent adviser or that he may have known, (ii) relied on the advice of Seay, or (iii) failed to ask Sardagna any questions during his informational presentations,[2] does not support the conclusion that he knowingly participated in any alleged fiduciary breaches. Indeed, each of the acts Sardagna may have known of are not in and of themselves automatic fiduciary breaches. Moreover, Sardagna's knowledge of these acts does not translate to knowing participation in fiduciary breaches.

Obviously, it would be quite another thing if there was credible evidence that Sardagna conspired with Seay and others to manipulate or induce the Glaziers Plan trustees into breaching their fiduciary duties. As the jury verdict reflects, there simply is no such evidence. Therefore, the Court concludes there is not sufficient evidence to support a finding that Sardagna knowingly participated in fiduciary breaches. Accordingly, Plaintiffs may not recover equitable relief under section 502 (a) (3) for alleged violations of section 404(a).

III. CONCLUSION

Based on the foregoing, the Court DEFERS judgment on Plaintiffs' claim under ERISA section 406 pending further briefing by the parties. As to Plaintiffs' claim

under ERISA section 404, the Court rules in favor of Defendants, concluding that Sardagna did not breach his own alleged fiduciary duties and did not knowingly participate in breaches of fiduciary duties.

IT IS SO ORDERED.

DATED: December 3, 2001

WILLIAM J. REA
United States District Judge

FOOTNOTES

[1] Notably, the fact that the jury rejected this claim says nothing of whether the contract was valid.

[2] This fact further supports the Court's previous conclusion that Sardagna did not render investment advice to the Glaziers Plan trustees, and, certainly, that the Glaziers Plan trustees did not look to him for such advice.

Case No. CV 99-08045 WJR (CTx)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

THE SOUTHERN CALIFORNIA, ARIZONA, COLORADO, AND SOUTHERN NEVADA GLAZIERS ARCHITECTURAL METAL AND GLASS WORKERS PENSION TRUST, an employee pension benefit plan, CB RICHARD ELLIS, INC., et al.,
Plaintiffs,

v.

PETER SARDAGNA, an individual, LAMM EMPLOYEES, L.P., a California limited partnership, and LAMME, INC., a California corporation,
Defendants.

FURTHER ORDER RE PLAINTIFF CB ELLIS INVESTORS, LLC'S MOTION TO ALTER AND AMEND THE JUDGMENT OR, ALTERNATIVELY, FOR A NEW TRIAL ON THE ISSUE OF THE STATUTE OF LIMITATIONS

April 29, 2 Filed

On December 4, 2001, this Court issued an order Re Plaintiff CB Ellis Investors, LLC's Motion To Alter And Amend The Judgment Or, Alternatively, For A New Trial On The Issue Of The Statute Of Limitations ("December 4 Order"). The Court resolved all the issues presented in Plaintiff's motion, except one: Pending further briefing, the Court deferred ruling on whether Defendant Sardagna was a service provider under the Employee Retirement Income Security Act ("ERISA"), such that his involvement in the August 15, 1995 LA

MetroMall LLC Operating Agreement ('LA MetroMall LLC Transaction") would make that transaction a prohibited one under ERISA Section 406.

Having considered the further briefing submitted in support of, and in opposition to, Plaintiff's motion, including an amicus brief filed by the Secretary of Labor, U.S. Department of Labor (IDOL"), and having considered all relevant authorities, the Court hereby-ORDERS as follows:

DISCUSSION

Section 406 of ERISA prohibits any financial or property transaction between a plan and a "party in interest." 29 U.S.C. § 1106(a)(1). (a)(1). A party in interest is defined to include plan fiduciaries and those who, although not fiduciaries, provide services to the plan. 29 U.S.C. § 1002 (14) (A) & (B).[1]

As stated, service providers are deemed to be parties in interest under the ERISA statutes. 29 U.S.C. § 1002(14)(B). In the December 4 Order, this Court found that "Sardagna more appropriately acted as a 'real estate consultant by providing information and assisting in the entitlement process regarding the Carson Property." (Dec. 4 Ord. at 12.) The resulting question, then, is whether this conduct makes Sardagna a service provider under ERISA. Unfortunately, there is little, if any, case law available to directly guide this Court's conclusion. [2] Nonetheless, the Court now finds the issue to be subject to a relatively simple resolution.

The Court initially was concerned with the fact that, to the extent Sardagna was providing services to the Plan, such services were directed to only a single Plan

asset and were not directed to the Plan as a whole; in contrast to, for example, the services provided by an accountant or bookkeeper. However, upon further consideration, it is clear that this distinction is without a difference under ERISA.

In enacting the ERISA statutory scheme, Congress intended to impose per se prohibitions on certain transactions so as to protect against a high potential for loss of plan assets or for insider abuse. 29 U.S.C. § 406(a); Cutaiar v. Marshall, 590 F.2d 523, 529 (3d Cir. 1978); M & R Investment Co. v. Fitzsimmons, 484 F. Supp. 1041, 1055 (D. Nev. 1980). However, to avoid undue harshness, Congress also provided in Section 408 that certain transactions are exempt from a per se prohibition. 29 U.S.C. § 1108(a)-(e).

Here, there is nothing in Sections 406 or 408 to suggest that providing services to only a single plan asset makes an otherwise prohibited transaction permissible. To be sure, in a September 6, 1979 DOL information letter, the DOL advised that a property manager of a single plan asset was a service provider to the plan within the meaning of Section 406. (DOL Amicus Br., Ex. C.) Moreover, Sardagna states that he "has no particular quarrel" with the proposition that "one may be a service provider within the meaning of § 3(14)(8) if he provides services only to a single plan asset or transaction; and that such services need not be regular or continuous." (Sardagna Br. in Resp. to DOL Amicus Br. at.1.) Accordingly, it would appear that Sardagna was a service provider to the Plan, which, under Section 406, would make the LA MetroMall LLC Transaction a prohibited one.

However; Sardagna argues vehemently that, notwithstanding the acknowledgment of these general

principles, as applied to the facts of this case, Sardagna is not a service provider under ERISA for four reasons. The Court is not persuaded by Sardagna's arguments.

First, Sardagna contends that he never provided services to the Plan, but, rather, he only provided services to Carson Realty Partners 1989 LP. Specifically, Sardagna argues that "(a]11 of Sardagna's activities in acting as a real estate consultant by providing information and assisting in the entitlement process regarding the Carson property were performed by him for Carson Realty Partners 1989 LP, as a contracted employee of that entity," and that "Carson Realty Partners 1989 LP was a borrower from the Glaziers." (Sardagna Br. at 4.)

The Court is not convinced that, even under the facts Sardagna alleges, Sardagna still is not a party in interest. To the contrary, ERISA provides that a party in interest includes an employee, officer, director (or an individual having powers or responsibilities similar to those of officers or directors), or a 10 percent or more shareholder directly or indirectly, of a person described in subparagraph (B) (i.e., a service provider] . . .." 29 U.S.C. § 1002(14)(H). Here, it appears clear that, to the extent Sardagna was providing a service to Carson Realty Partners 1989.LP, such services were for the benefit of the Glaziers Plan. Indeed, in the event Carson Realty Partners 1989 LP was, in fact, only a "borrower" of the Plan, substantial evidence reflects that the Partnership did not have any assets with which to repay any purported loan. Therefore, it appears that, in consideration for any loan, Carson Realty Partners 1989 LP provided services to the Plan in the form of Sardagna's assistance as a real estate consultant

concerning the Carson property. As a result, as a self-admitted employee of Carson Realty Partners 1989 LP, [3] the Court concludes that Sardagna was a party in interest under Section 3(14)(H).

Second, Sardagna argues that, to the extent he ever was a service provider to the Plan, he was not one at the time the LA MetroMall LLC Transaction occurred on August 16, 1995. Sardagna's support for this argument comes from an August 1, 1995 Termination and Settlement Agreement that purportedly was "designed, structured and drafted . . . specifically to eliminate any possible contention that Sardagna was a service provider . . . as of August 1, 1995." (Sardagna Br. at 7.)

However, Sardagna's service provider status is not governed by any sort of contract. To be sure, Section 3(14) makes no reference that the existence of a contract is in any way relevant to determining service provider status. [4] Moreover, there is substantial credible evidence indicating that the nature of Sardagna's relationship to the Plan did not change following the execution of that agreement, and Sardagna does not dispute such evidence. Accordingly, regardless of any contractual agreement to the contrary, Sardagna was a service provider to the Plan at the time of the LA MetroMall LLC Transaction. Under the circumstances, the Court declines to exalt form over substance, and concludes that the August 1, 1995 Termination and Settlement Agreement does not affect Sardagna's status as a service provider to the Plan.

Third, Sardagna claims the LA MetroMall LLC Transaction was not prohibited under ERISA, pursuant to an exemption regarding "real estate operating

companies." Despite the Court's earlier conclusion that "the Court (was) not convinced that LA MetroMall LLC was an ERISA-qualified REOC," (Dec. 4 Ord. at 17), Sardagna seeks to further argue what he characterizes as "the Court's misgivings" on this claim. (Sardagna Br. at 2.) Notwithstanding Sardagna's additional factual arguments, the Court finds that LA MetroMall LLC.is not an ERISA-qualified REOC.

Lastly, Sardagna argues that "the Glaziers are . . . estopped to contend now that the transaction was a prohibited transaction" because "the Glaziers and their lawyers . . . meticulously structured and documented the LA MetroMall, LLP, transaction in such a way as to ensure that it was not a `prohibited transaction' under ERISA § 406."(Sardagna Br. at 2.)

There are two reasons why the Court does not find this argument persuasive. Most importantly, Sardagna has presented no authority recognizing the application of an estoppel defense in an ERISA action on similar facts. To be sure, the per se prohibitions ERISA imposes seem to belie any notion that equities are to be considered in determining whether an ERISA transaction is prohibited. And secondarily, Sardagna apparently refuses to recognize the distinction this Court made in its December 4 Order between the wrongdoing fiduciaries (and their agents) and the Plan beneficiaries. (Dec. 4 Ord. at 6.) Presumably - - indeed, there is no evidence to the contrary - - the Glaziers' attorneys were acting pursuant to direction from the wrongdoing trustees. In that capacity, they were acting as agents of the trustees, and were aligned with that position.

As the Court noted in the December 4 Order, the fact that Plaintiff CB Ellis represents the Glaziers Plan (and its beneficiaries) does not mean that Plaintiff CB Ellis represents the wrongdoing trustees. [5] (Id.) As potential co-defendants, the wrongdoing trustees and the attorneys are not the parties against whom an estoppel defense - - even if it were permitted - - would be asserted. Accordingly, the Court rejects Sardagna's argument that Plaintiffs are estopped from pursuing their ERISA claims.

Having concluded that Sardagna is a service provider under Section 406 such that the LA MetroMall Transaction was a prohibited one under ERISA, the court must now address Plaintiffs' request for equitable relief.

This Court has authority to grant equitable relief against Sardagna based on the instant violation of Section 406. [6] Plaintiffs request the limited equitable remedy of rescission and cancellation of Sardagna's interest in LA MetroMall LLC. This relief would enable Plaintiffs to sell the Carson property without being subject to Sardagna's exercise of his right to refuse consent to a sale of the property, which Sardagna has made clear he will invoke if sale of the property does not yield some return for him. Absent the relief requested, Plaintiffs may find themselves embroiled in proceedings concerning the reasonableness of Sardagna's refusal to consent. Under the circumstances, the Court finds that this is not a burden Plaintiffs should be forced to face.

Moreover, the Court is not convinced that granting Plaintiffs' requested equitable relief will result in a large windfall to Plaintiffs. As the Court noted previously, evidence at trial showed that the property

is worth less today than the sum of the Glaziers Plan investments. Because Sardagna's monetary interest in the property will be realized only if proceeds from the sale of the Carson Property repays the Plan its investment plus 15% and an additional $6 million, even if the Court were to leave the transaction in place as it stands today, it is highly unlikely Sardagna will ever recover anything from the Carson Property investment. [7]

Accordingly, the Court concludes that cancellation and rescission of the LA MetroMall LLC Transaction is appropriate equitable relief under the facts of this case. Such relief will permit the Plan and its beneficiaries to recoup at least some of their investment without being subject to Sardagna's right to withhold consent to the sale.

IT IS SO ORDERED.

DATED: April 26, 2002

WILLIAM J. REA
United States District Judge

FOOTNOTES

[1] In the December 4 Order, this Court ruled that Sardagna did not operate in a fiduciary capacity with Plaintiffs.

[2] To be sure, Sardagna does not cite a single case in his entire seventeen pages of briefing on this specific issue.

[3] Sardagna also would be considered a party-in-interest because he had a 25% ownership interest in

Carson Realty Partners 1989 LP. 29 U.S.C. § 1002(14)(H). On this point, Sardagna argues that "his limited partnership interest was also subordinate to a $22 million debt to Ferrante or one of Ferrante's entities. By virtue of this senior debt, Sardagna had less than a 10% interest in Carson Realty Partners 1989 LP . . .." (Sardagna Br. at 4.) Notably, not only does Sardagna fail to cite any authority for his position that his ownership interest should be reduced by any superior debt, but he also fails to offer any evidence as to how that superior debt conveniently reduced his interest to less than 10%. Regardless, it is of little moment because Sardagna remains a party in interest as an employee of Carson Realty Partners 1989 LP.

[4] Notably, Sardagna provides no authority for his assertion that "[w]hether a person is a service provider to an ERISA plan is a matter of contract, and is a function of the agreements, if any, between them." (Sardagna Br. at 11.) Indeed, there is none.

[5] In this regard, the Court takes issue with Sardagna's following assertion: "Glaziers' trial counsel has suggested that his clients (the trustees) may themselves have been wrongdoers." (Sardagna Br. at 16.)

[6] The Court, therefore, rejects Sardagna's argument that equitable relief is not appropriate because he is not a wrongdoer in the same sense that the fiduciary trustees are wrongdoers. Indeed, the Supreme Court rejected this same argument in Harris Trust & Savings Bank v. Salomon Smith Barney, Inc., 530 U.S. 238 (2000)

> The Court rejects Salomon's argument that it would contravene common sense

> for Congress to impose civil liability on a party, such as a nonfiduciary party in interest to a § 406(a) transaction, that is not a "wrongdoer" in the sense of violating a duty expressly imposed by ERISA Title I's substantive provisions. This argument ignores the limiting principle explicit in § 502(a)(3): that the retrospective relief sought be "equitable relief." The common law trusts, which offers a starting point for ERISA analysis, plainly countenances the sort of relief sought by petitioner against Salomon here.

Id. at 239-40 (upholding action for restitution against nonfiduciary party in interest in prohibited transaction). See also Nieto v. Ecker, 845 F.2d 868, 873 (1988) (finding a nonfiduciary service provider is subject to liability: "The Act prohibits certain transactions between ERISA plans and their parties in interest. . . . Because these transactions are illegal under the Act, the district courts are authorized by section 502(a)(3) `to redress such violations.'").

[7] The Court is not convinced by Sardagna's argument that "leaving the agreement in place would cause no economic harm to the Glaziers." (Sardagna's Post-Trial Br. at 28.) Although the property will sell for whatever price the market will bear, likely regardless of whether the agreement stays in place or not, the economic harm to the Glaziers comes from the possibility that, if the agreement stays in place, the Glaziers will be forced to litigate the reasonableness of Sardagna's expected refusal to consent to the sale. Clearly, the costs of litigation impose an economic harm. Moreover, it is possible the market value of the

Carson Property may be affected if the agreement stays in place because of the cloud on title cast by Sardagna's right to refuse consent to the sale.